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**MAILED**

**SEP 23 2010**

**OFFICE OF PETITIONS**

In re Application of Burst et al.	:	
Application No. 09/782,305	:	Decision on Petition
Filing Date: February 14, 2001	:	
Attorney Docket No. 51193	:	

This is a decision on the petition under 37 CFR 1.181 filed April 23, 2010, requesting the Office withdraw the holding of abandonment. This is also a decision in response to the petition under 37 CFR 1.53(e) filed April 23, 2010, requesting the application be accorded a filing date of February 14, 2001.<sup>1</sup>

The petition under 37 CFR 1.181 is **granted**.

The petition under 37 CFR 1.53(e) is **granted**.

The Petition Under 37 CFR 1.181

Application papers were filed February 14, 2001, by the Law Offices of Keil & Weinkauff ("Keil & Weinkauff"). The specification filed February 14, 2001, included references to drawing Figures 1-3.

The application papers matched with the file did not include any drawings.

On June 21, 2002, the Office of Patent Application Processing mailed a notice stating drawings had not been filed, the application had not been accorded a filing date, and the filing date for the application would be the date of receipt of the drawings. The notice stated a response to the notice must be filed within two months of the mailing date of the notice or proceedings on the application would be terminated.

A reply to the June 21, 2002 notice was not matched with the file and the Office mailed a Notice of Abandonment on June 2, 2004.

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<sup>1</sup> **Error! Main Document Only.** The original "Petition to Accord Filing Date" cannot be located in the application file. Therefore, this decision is based on the copy of the petition supplied on April 23, 2010.

The petition under 37 CFR 1.181 states,

[A] hand written statement on a Post-It note believed in the hand of Mary Lu Chadwick, a member of the clerical staff at Keil & Weinkauff in 2004 states that "[t]his is a mistake we have already filed a Petition 7-10-02 no response from PTO." No due date was entered into the Keil & Weinkauff docket in connection with the Notice [Attachement I] and no further action was taken at this juncture.

The application file was transferred from Keil & Weinkauff to the Law Offices of Novak, Druce + Quigg, LLP ("Novak Druce") during February 2005.

On February 11, 2010, foreign counsel for applicants contacted Novak Druce in order to inquire into the status of the July 15, 2002 petition.

The instant petition to withdraw the holding of abandonment was filed April 23, 2010. The petition asserts a reply to the June 21, 2002 notice, in the form of a "Petition to Accord Filing Date," was timely filed July 15, 2002.

Although proceedings for an application which has *not* been accorded a filing date can be terminated, an application which has not been accorded a filing date cannot become abandoned. Therefore, the issue to be addressed by the Office is whether or not the Office properly terminated proceedings for the application.

A review of the USPTO file for this application indicates the file does not include a copy of the July 15, 2002 petition. However, the petition under 37 CFR 1.181 includes a postcard receipt acknowledging the Office received a "Petition to Accord Filing Date" on July 15, 2002.<sup>2</sup> Therefore, the Office is persuaded the petition was filed July 15, 2002, and later misplaced by the Office.

In view of the preceding discussion, the Notice of Abandonment is withdrawn and proceedings for the application are hereby reopened.

#### The Petition Under 37 CFR 1.53(e)

The "Petition to Accord Filing Date" asserts three sheets of drawings were part of the original application papers.

A review of the USPTO file for this application indicates the file does not include a copy of any drawings filed February 14, 2001. However, the petition includes a postcard receipt

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<sup>2</sup> Evidence of receipt of any correspondence filed in the Patent and Trademark Office can be obtained by submitting a self addressed post card properly itemizing and identifying the paper or papers being filed. Upon receipt of the correspondence, the Patent and Trademark Office will check the listing on the post card against the papers submitted, making sure that all items listed are present and will then stamp the postcard with an Official date stamp and place the post card in the outgoing mail. "A post card receipt which itemizes and properly identifies the papers which are being filed serves as *prima facie* evidence of receipt in the PTO of all items listed thereon by the PTO." M.P.E.P. § 503.

acknowledging the Office received "3 sheets of drawings" on February 14, 2001. Therefore, the Office is persuaded three sheets of drawings were filed July 15, 2002, and later misplaced by the Office.

In view of the preceding discussion, the application will be accorded a filing date of February 14, 2001.

The Office has not charged a petition fee for the petition under 37 CFR 1.53(e) to the deposit account identified in the petition since the petition has established drawings were filed February 14, 2001.

#### Conclusion

Proceedings for the application are reopened.

The Office of Patent Examination will be informed of the instant decision and will process the application with a filing date of February 14, 2001, using the application papers filed February 14, 2001, and the copy of the drawings filed April 23, 2010.

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



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